

TERESA KUAN CHIN

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v.

CHUA SZE CHIANG

HIGH COURT SABAH & SARAWAK, KUCHING
CLEMENT SKINNER J

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[DIVORCE PETITION NO: 33-177-2001-III(I)]
20 DECEMBER 2006

FAMILY LAW: *Matrimonial assets - Division of - Order for division of matrimonial assets - Whether hinges on decree of judicial separation - Whether decree of judicial separation pronounced or made - Death of wife - Whether marriage dissolved by death - Whether court unable to grant a decree of divorce or judicial separation - Whether wife's cause of action for division of matrimonial properties did not survive for the benefit of her estate - Law Reform (Marriage and Divorce) Act 1976, ss. 8, 76, 78, 81*

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FAMILY LAW: *Maintenance - Payment of - Death of wife - Whether expired on death of wife - Whether wife's cause of action survived for benefit of estate - Law Reform (Marriage and Divorce) Act 1976, ss. 8, 76, 78, 81*

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FAMILY LAW: *Maintenance - Payment of - Child's right to receive maintenance - Whether ceased on attaining age of 18 - Whether there was cause of action for maintenance - Law Reform (Marriage and Divorce) Act 1976, ss. 8, 76, 78, 81*

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This was the hearing of an appeal to the judge in chambers against the decision of the deputy registrar dismissing an application by the executrix and trustee ('the executrix') of the last will of the deceased, to be made to a party to the cause and that the name of Teresa Kuan Chin be substituted with that of the executrix in this petition as well as in two other proceedings which were consolidated with these proceedings. The facts that led to this appeal was that Teresa Kuan Chin ('the wife') was married to Chua Sze Chiang ('the husband'). Husband and wife were shareholders and directors in a company, Khoon Seng Enterprise Sdn Bhd ('Khoon Seng Enterprise') which was the registered owner of a shophouse ('the shophouse'). The marriage went sour and marriage difficulties gave rise to three suits (first suit, second suit and third suit). In the first suit, the wife sought for, *inter alia*, that custody of the youngest child be given to her. On 15 August

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- A 2001, the court ordered that until all the controversies between the parties in the first suit was heard, the husband pay a sum of RM3,600 as maintenance towards the wife and child. In the second suit, the wife sought a decree of judicial separation on the grounds that the husband had behaved unreasonably and
- B committed adultery. In the third suit, it was the husband who petitioned for the dissolution of marriage. On 20 October 2003, the wife passed away, but before she did she made a will and appointed her sister as the executrix and trustee of her will. In her will the wife had devised her 30% (or 1/3) shares in Khoon
- C Seng Enterprise to her three children in equal shares. She also devised all her other real and personal property to her three children in equal shares. On 29 March 2004, the executrix was granted probate of the will of the deceased wife. On 15 April 2005 a first supplementary probate was issued to the executrix in
- D which the three suits abovementioned were included as 'other assets' of the deceased wife's estate. On 8 September 2004, the executrix filed this application. It was her case that the cause of action against the respondent husband survived in respect of the deceased wife's application for ancillary relief and division of
- E matrimonial properties by virtue of s. 8(1) of the Civil Law Act 1956 read with O. 15 r. 7(1) and (2) of the Rules of the High Court 1980 ('RHC'). The respondent husband contended that on the death of the wife, her claims for ancillary relief and for a share of the matrimonial assets, being personal in nature, did not survive
- F for the benefit of her estate, and so the executrix's application should be and was rightly dismissed. The issues that arose were (1) whether executrix was competent to or had title to make this application in the first place; (2) whether the deceased's wife claim for ancillary relief and a share of the matrimonial assets were
- G causes of action which on her death, survived for the benefit of her estate.

Held (dismissing the executrix's appeal with costs):

- H (1) Section 76 of the Law Reform (Marriage & Divorce) Act 1976 ('the Act') states that the court shall only have power to order the division of matrimonial assets when granting a decree of divorce or judicial separation. Such an order cannot be made independently of or without the court first making a
- I decree of judicial separation in favour of the wife, because the order for division of matrimonial assets hinges on the decree of judicial separation. (para 21)

- (2) No decree of judicial separation had been pronounced or made, and, with the death of the wife could never be made because with her demise, the object of the second suit was gone, in that, it was not possible to pronounce a decree of judicial separation in respect of a marriage which had been dissolved by death (s. 8 of the Law Reform (Marriage & Divorce) Act 1976). (para 23) A B
- (3) The combined effect of s. 8 and s. 76 of the Act was that where a petitioner had died before a decree of divorce or judicial separation was granted, there was no longer any subject matter to which the purported decree absolute or judicial separation could apply, the marriage already having been finally dissolved by death. Further, since the court would be unable to grant a decree of divorce or judicial separation, it would have no power or jurisdiction to order the division of matrimonial assets by way of ancillary relief. The wife's cause of action for a division of the matrimonial properties did not survive for the benefit of her estate. (paras 25 & 26) C D
- (4) A reading of ss. 78 and 81 of the Act show that while the court does have the jurisdiction to order the payment of maintenance to a wife during the course of matrimonial proceedings and even before granting a decree of divorce or judicial separation, yet the order of maintenance would expire on the death of the husband or wife if unsecured or if secured, on the death of the spouse in whose favour it was made. The court did make an order for maintenance in favour of the wife and child during the course of proceedings but the maintenance was unsecured. As far as the wife was concerned, the order of maintenance expired on her death. The husband was under no obligation to make any further payments towards her maintenance. Clearly the wife's cause of action to be paid maintenance did not survive for the benefit of her estate, it being a personal right which expired on her death. (paras 29 & 30) E F G H
- (5) As far as the child was concerned, his right to receive maintenance ceased on his attaining the age of 18 years which happened on 23 October 2004. So presently, the child being no longer a minor there was no subsisting cause of action for maintenance on his behalf which survived the wife for his I

- A benefit. For the above reasons, on the wife's death, no cause of action for the payment of maintenance survived for the benefit of her estate or the child. (paras 31 & 33)

Case(s) referred to:

- B *Barder v. Caluori* [1987] 2 WLR 1350 (*refd*)
Chew Ling Hang v. Aw Ngiong Hwa [1997] 4 CLJ 448 CA (*refd*)
Ong Ah Ngim v. Lau Kiok Kia [1956] SCR 7 (*refd*)
Husli Mok & Ors v. Probate Officer, Miri [1996] 5 MLJ 420 (*refd*)
King Hock Ching v. Ung Siew Ping [1974] 2 MLJ 16 (*refd*)
Re Seaford, Deceased, Seaford v. Seifert [1968] P53 (*refd*)

- C **Legislation referred to:**

Administration of Estates Ordinances Cap 80, ss. 4, 15
Civil Law Act 1956, ss. 8(1)
Law Reform (Marriage and Divorce) Act 1976, ss. 8, 76, 77(1), 78, 81

- D Rules of the High Court 1980, O. 15 r. 7(1), (2)

For the petitioner - Ernest Chua; M/s Ernest Chua & Co

For the respondent - Shankar Ram; M/s Thomas Shankar Ram & Co

- E *Reported by Suhainah Wahiduddin*

JUDGMENT

Clement Skinner J:

- F [1] This is the hearing of an appeal to the judge in chambers against the decision of the learned deputy registrar given on 6 October 2004. On that date he dismissed an application by one Kuan Jiew Moi @ Kwan Nem Se, who is the Executrix and
- G Trustee ('the executrix') of the last will of Teresa Kuan Chin (deceased), to be made a party to the cause and that the name of Teresa Kuan Chin be substituted with that of the executrix in this petition as well as in two other proceedings which were consolidated with these proceedings, namely, Originating Summons
- H No. 24-123-2001-III-I and Divorce Petition No. 33-51-2003-III-I. She also prayed for an order that thereafter all these three proceedings be carried on by her as the executrix and trustee of Teresa Kuan Chin.
- I [2] The facts giving rise to this appeal are these.

[3] Teresa Kuan Chin ('the wife') was married to Chua Sze Chiang ('the husband') on 21 May 1979. There are three children from their union. The husband and wife were shareholders and directors in a company called Khoon Seng Enterprise Sdn Bhd ('Khoon Seng Enterprise'), which is the registered owner of a shophouse held under title known as Lot 19, Section 28 Kuching Town Land District ('the shophouse'). The marriage went sour. Their marriage difficulties gave rise to three suits. They are described below.

[4] In Originating Summons No. 24-123-2001-III-(I) which was filed on 30 April 2001 ('the 1st suit'), the wife sought the following relief:

- (a) that care, custody and control of the youngest child who was then 15 years old be given to her (the other two children having attained their age of majority);
- (b) that the husband pay RM3,600.00 a month to maintain her and the child;
- (c) that the husband be restrained from assaulting her or from interfering with her life and business.

[5] On 15 August 2001 the court ordered that until all the controversies between the parties in the 1st suit was heard, the husband pay a sum of RM3,600 as maintenance towards the wife and child.

[6] In this petition which was filed by the wife on 14 December 2001 ('the 2nd suit'), she sought a decree of judicial separation on the grounds that the respondent husband had behaved unreasonably and had committed adultery. The wife also asked to be granted care, custody and control over the youngest child of the marriage. By way of ancillary relief the wife also sought the following orders:

- (a) that the respondent husband may be ordered to make to the petitioner such maintenance pending suit and thereafter such periodical payments, secured provisions and lump sum payment or sums as may be just;
- (b) that the respondent husband may be ordered to transfer all his right title share and interest in all that parcel of land together with the building thereon and appurtenances thereof situate at Sungai Maong, Kuching and containing an area of

- A 585.3 sq. metres, more or less and described as Lot 3103 Block 207 Kuching North Land District to the petitioner absolutely;
- B (c) that the respondent husband may be ordered to transfer all his right title share and interest in all that parcel of land together with the building thereon and appurtenance thereof at Sungai Maong, Kuching containing an area of 676.5 sq. metres more or less and described as Lot 3102 Block 207 Kuching North Land District to the petitioner to be held in trust for the three children of the marriage, namely, Calvin Chua Boon Seng, Melvin Chua Boon Poh and Jackson Chua Boon Ho in equal shares of 1/3 each;
- C (d) that the respondent husband may be ordered to pass a Board Resolution of Khoon Seng Enterprise Sdn Bhd to effect transfer of 1/2 out of the total share of all that parcel of land together with the building thereon and appurtenances thereof situate at Main Bazaar, Kuching, containing an area of 162.4 sq. metres, more or less and described as Lot 19, Section 28 Kuching Town Land District to the petitioner absolutely.
- D (e) that the respondent husband may be ordered to conduct a stock taking of Khoon Seng Enterprise Sdn Bhd of all the stocks of the said company and to pay to the petitioner in monetary term 30% of the value of stocks taken and 30% of the unappropriated profits of the company for the years 1997, 1998, 1999 and 2000.
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- F [7] In Divorce Petition 33-51-2003-III-(I) ('the 3rd suit') it is the husband who petitioned for the dissolution of the marriage. In the petition (by para. 25) the husband acknowledges that Khoon Seng Enterprise is the registered owner of the shophouse and that the husband held 2/3 of the shares while the wife held 1/3 of the shares in Khoon Seng Enterprise. The husband denied, however, that the two semi-detached houses he owns (and which are the subject of prayers (b) and (c) in the 2nd suit) were purchased from moneys belonging to Khoon Seng. In his petition, in addition to asking for a dissolution for the marriage, the husband also prayed for the following orders:
- G (b) That the respondent (wife) be entitled to the value of her 1/3 share in Khoon Seng Enterprise Sdn Bhd, its assets and liabilities and the said shophouse;
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- I (c) That the petitioner be given the liberty to purchase the 1/3 share of the said shophouse at market value;

(d) That such maintenance be ordered for the minor child.

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[8] On 20 October 2003 the wife passed away, but before she did she made a will, appointed her sister as the executrix and trustee of her will. In her will the wife devised her 30% (or 1/3) shares in Khoon Seng Enterprise to her three children in equal shares. She also devised all her other real and personal property to her three children in equal shares.

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[9] On 29 March 2004 the executrix was granted probate of the will of the deceased wife. On 15 April 2005 a 1st Supplementary Probate was issued to the executrix in which the 3 suits abovementioned were included as 'other assets' of the deceased wife's estate.

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[10] On 8 September 2004 the executrix filed this application seeking the orders I first mentioned in this judgment. It is her case that the cause of action against the respondent husband survives in respect of the deceased wife's application for ancillary relief and division of matrimonial properties by virtue of s. 8(1) of the Civil Law Act 1956 read with O. 15 r. 7(1) and (2) of the Rules of the High Court ('the RHC').

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[11] Section 8(1) of the Civil Law Act reads:

- (1) Subject to this section, on death of any person all causes of action subsisting against or vested in him shall survive against, or as the case may be, for the benefit of, his estate:

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Provided that this subsection shall not apply to causes of action for defamation or seduction or for inducing one spouse to leave or remain apart from the other or to any claim for damages on the ground of adultery.

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[12] And O. 15 r. 7(1) and (2) RHC reads:

- (1) Where a party to an action dies or becomes bankrupt but the cause of action survives, the action shall not abate by reason of the death or bankruptcy.
- (2) Where at any stage of the proceedings in any cause or matter the interest or liability of any party is assigned or transmitted to or devolves upon some other person, the court may, if it thinks necessary in order to ensure that all matters in dispute in the cause or matter may be effectually

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- A and completely determined and adjudicated upon, order that other person to be made a party to the cause or matter and the proceedings to be carried on as if he had been substituted for the first mentioned party.
- B [13] The husband respondent contends that on the death of the wife, her claims for ancillary relief and for a share of the matrimonial assets, being personal in nature, do not survive for the benefit of her estate and so the executrix's application should be and was rightly dismissed.
- C [14] Before considering the merits of the appeal I wish to deal with a related matter. It has to do with whether the executrix was competent to or had title to make this application in the first place because s. 4 of the Administration of Estates Ordinance Cap 80 Laws of Sarawak provides, *inter alia*, that no person (other than a
- D Probate Officer) shall assume possession of, dispose of, or deal with the assets of a deceased person unless he has obtained a grant of probate or letters of administration, and, s. 15 of the same Ordinance provides, *inter alia*, that the issue by a Probate Officer of probate or letters of administration shall vest in the executor or
- E administrator named therein for the purpose of administration of the property, estate and effects of the deceased set out in the list annexed to the grant. In *Ong Ah Ngim v. Lau Kiok Kia* [1956] SCR 7 (a Sarawak case), ss. 4 and 15 of the Ordinance were considered and it was held that '... a right of action, being part of
- F a deceased person's estate, must be included in a grant of letters of administration before it can be enforced by an administrator'. Put in another way, the right of action to sue on behalf of a deceased's estate, being a chose in action and therefore an 'asset' of the estate, must be included in a grant of letters of
- G administration before it could be enforced by an administrator. (See *King Hock Ching v. Ung Siew Ping* [1974] 2 MLJ 16; *Husli bin Mok & Ors v. Probate Officer, Miri* [1996] 5 MLJ 420).
- H [15] When this application first came before the learned deputy registrar the executrix had not, when extracting her grant of probate, included these 3 suits as 'assets' of the wife's estate. So her competency to make this application was attacked by counsel for the respondent. However, by the time this appeal was heard, the executrix had included these three suits in the grant of
- I probate. Accordingly there is no reason to refuse the application on this ground.

[16] With that I turn to consider the substantive question before the court. In my judgment the outcome of this appeal will turn on the question whether the deceased wife's claim for ancillary relief and a share of the matrimonial assets were causes of action which on her death, survived for the benefit of her estate. If they did, then the executrix's application is a proper one and should be allowed. If not, it must be dismissed.

[17] The critical question identified above does not arise for decision in a vacuum; it falls for decision in the context of proceedings brought by the wife under the Law Reform (Marriage & Divorce) Act 1976 ('the Act'). The principal remedy she sought was a decree of judicial separation. Ancillary to that, she wished to be paid maintenance for herself and for her youngest child, and, she also claimed a share of the alleged matrimonial properties.

[18] Since it is the Act that will ultimately determine the rights of the wife, the relevant provisions of that legislation must now be referred to.

[19] In doing so I have adopted the approach recommended by the House of Lords in *Barder v. Caluori* [1987] 2 WLR 1350. Although it is a case decided under English matrimonial legislation, I have found it very useful for the principle stated there. In that case Lord Brandon of Oakbrook said this regarding the question of abatement (after having reviewed several authorities on the matter) at p. 1360:

I will state the conclusions to which I think that these authorities lead in this way. First, there is no general rule that, where one of the parties to a divorce suit has died, the suit abates, so that no further proceedings can be taken on it. The passage in the judgment of Shearman J, in *Maconochie v. Maconochie* [1916] P.326, 328, in which he stated that such a general rule existed, cannot be supported. Secondly, it is unhelpful, in cases of the kind under discussion, to refer to abatement at all. *The real question in such cases is whether, where one of the parties to a divorce suit has died, further proceedings in the suit can or cannot be taken.* Thirdly, the answer to that question, when it arises, depends in all cases on two matters and in some cases also on a third. *The first matter is the nature of the further proceedings sought to be taken. The second matter is the true construction of the relevant statutory provision or provisions, or of a particular order made under them or both.* The third matter is the applicability of section 1(1) of the Act of 1934. (emphasis added).

A [20] With regard to the wife's ancillary claim for a division of the alleged matrimonial properties mentioned in the 2nd suit, s. 76 of the Act is the statutory provision that grants the court power to make such an order. Section 76 reads:

B **Power of court to order division of matrimonial assets**

(1) The court shall have power, when granting a decree of divorce or judicial separation, to order the division between the parties of any assets acquired

C (2) ...

(3) The court shall have power, when granting a decree of divorce or divorce judicial separation, to order the division between the parties of any assets acquired during the marriage

D [21] It is clear from what is stated in s. 76 that the court shall only have power to order the division of matrimonial assets 'when' granting a decree of divorce or judicial separation. Such an order cannot be made independently of or without the court first making a decree of judicial separation in favour of the wife, because the order for division of matrimonial assets hinges on the decree of judicial separation.

E [22] In *Chew Ling Hang (P) v. Aw Ngiong Hwa* [1997] 4 CLJ 448, the Court of Appeal had occasion to consider the significance of the word 'when' appearing in s. 76 of the Act while considering the question whether a spouse who has not applied for ancillary relief before a divorce decree is made absolute can make such an application at an indefinite time thereafter, and if so, whether leave of court was required, and under what circumstances.

G In holding that such an application must be made before the *decree nisi* is made absolute, failing which leave of the court must be obtained to make such an application, the Court of Appeal said (per Mahadev Shankar JCA) at p. 3486:

H It is the opinion of this court that 'when' here means at the time the decree is being granted ... The residuary powers of the court to extend or abridge time is always there but the words are clear and my order for ancillary relief must relate back to the granting of the decree because it is upon the decree that the ancillary relief is hinged.

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[23] Reverting to the facts of this case, no decree of judicial separation has been pronounced or made, and, with the death of the wife can never be made because with her demise, the object of the 2nd suit is gone, in that, it is not possible to pronounce a decree of judicial separation in respect of a marriage which has been dissolved by death since it is expressly provided in s. 8 of the Act that:

Continuance of marriage

Every marriage ... shall continue until dissolved:

- (a) by the death of one of the parties; or
- (b) ...
- (c)

[24] In *re Seaford, Deceased, Seaford v. Seifert* [1968] P.53 it was held that the death of the husband not only caused the suit to abate; it destroyed the cause of action as there was no longer any subject matter to which the purported decree absolute could apply.

[25] So the combined effect of s. 8 and s. 76 of the Act is that where a petitioner has died before a decree of divorce or judicial separation is granted, there is no longer any subject matter to which the purported decree absolute or judicial separation could apply, the marriage already having been finally dissolved by death. Further, since the court would be unable to grant a decree of divorce or judicial separation, it would have no power or jurisdiction to order the division of matrimonial assets by way of ancillary relief

[26] For the above reasons I find that the wife's cause of action for a division of the matrimonial properties did not survive for the benefit of her estate.

[27] With regard to the wife's claim for maintenance, which is the subject matter of the 1st and 2nd suits, her right to such relief is provided in ss. 77 and 81 of the Act. Section 77(1) states that:

A Power for court to order maintenance of spouse

The court may order a man to pay maintenance to his wife or former wife:

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- (a) during the course of any matrimonial proceedings;
 - (b) when granting or subsequent to the grant of a decree of divorce or judicial separation;
 - (c) if, after a decree declaring her presumed to be dead, she is found to be alive.

C [28] And s. 81 reads:

Duration of orders for maintenance

D Except where an order for maintenance is expressed to be for any shorter period or where any such order has been rescinded, and subject to section 82, an order for maintenance shall expire:

- (a) if the maintenance was unsecured, on the death of the husband or of the wife, whichever is the earlier;
- E** (b) if the maintenance was secured, on the death of the spouse in whose favour it was made.

F [29] A reading of these two sections show that while the court does have the jurisdiction to order the payment of maintenance to a wife during the course of matrimonial proceedings and even before granting a decree of divorce or judicial separation, yet the order of maintenance will expire on the death of the husband or wife if unsecured or if secured, on the death of the spouse in whose favour it was made.

G [30] In our case, the court did make an order for maintenance in favour of the wife and child during the course of proceedings but the maintenance was unsecured. As far as the wife is concerned, the order of maintenance expired on her death. The husband is under no obligation to make any further payments towards her maintenance. Clearly the wife's cause of action to be paid maintenance did not survive for the benefit of her estate, it being a personal right which expired on her death.

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[31] As far as the child is concerned, his right to receive maintenance ceased on his attaining the age of 18 years which I understand happened on 23 October 2004. So presently, the child being no longer a minor there is no subsisting cause of action for maintenance on his behalf which survived the wife for his benefit.

[32] Having said that, I must make it clear that I agree with the proposition put forward by Mr. Ernest Chua of counsel for the wife that where, as here, an order for maintenance has already been made under the relevant statutory provisions, a right to be paid such maintenance under that order would have accrued to the wife such that if the husband was or is in arrears of maintenance payment to the wife and child, her right to such arrears under the order already made would have survived for the benefit of her estate and the child, but that is not the case here because the husband settled all arrears of maintenance of RM16,000 payable to the child on 9 May 2005.

[33] For the above reasons I find that on the wife's death no cause of action for the payment of maintenance survived for the benefit of her estate or the child.

[34] In the result I dismiss the executrix's appeal with costs.

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